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D.O., Appellant)	
)	
and)	Docket No. 15-1004
)	Issued: July 28, 2015
U.S. POSTAL SERVICE, POST OFFICE,)	
Bedford Park, IL, Employer)	
)	

Case Submitted on the Record

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES A. HAYNES, Alternate Judge

On March 30, 2015 appellant filed a timely appeal from a March 2, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

The issues are: (1) whether OWCP properly determined that appellant received an \$11,864.54 overpayment of compensation; and (2) whether OWCP properly determined that appellant was at fault in the creation of the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

² Appellant submitted additional evidence after OWCP's March 2, 2015 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

OWCP accepted that on January 14, 2011 appellant, then a 50-year-old rural carrier, sustained a left arm sprain and left medial epicondylitis when he twisted his arm at work on that date. Appellant received disability compensation on the daily rolls beginning March 5, 2011. He later began to receive disability compensation on the periodic rolls.

On June 5, 2014 appellant completed an EN1032 form which asked him various questions about his employment, self-employment, and volunteer work for the 15 months prior to the signing of the form.

On August 25, 2014 OWCP received an August 13, 2014 document from the Office of Personnel Management (OPM) which indicated that appellant was not being paid as an OPM annuitant.

On October 2, 2014 OWCP received an OPM form, signed by appellant on September 26, 2014, in which he indicated that effective September 26, 2014 he was electing to receive benefits under the Federal Employees' Retirement System (FERS) in preference to any benefits to which he might be entitled under FECA.

In a January 2, 2015 letter to OWCP, the employing establishment indicated that appellant may be in receipt of both OPM and FECA benefits. It attached a copy of the election form completed by appellant on September 26, 2014.³

In a January 26, 2015 notice, OWCP advised appellant of its preliminary determination that he received an \$11,864.54 overpayment of compensation because of his election "to receive benefits from [OPM] effective September 26, 2014 while you were still receiving compensation for total disability on the periodic rolls through January 10, 2015."⁴ It also made a preliminary determination that he was at fault in the creation of the overpayment because he accepted a payment that he knew or reasonably should have known was incorrect.⁵ OWCP advised appellant that he could submit evidence challenging the fact, amount, or finding of fault and request waiver of the overpayment. It requested that he complete and return an enclosed financial information questionnaire within 30 days even if he was not requesting waiver of the overpayment.⁶

³ The record also contains a January 2, 2015 letter to OPM in which OWCP asked OPM to reimburse it for FECA benefits paid to appellant between September 26, 2014 and January 10, 2015.

⁴ A worksheet of record indicates that appellant received \$11,864.54 in FECA benefits between September 26, 2014 and January 10, 2015.

⁵ OWCP asserted that the language of an EN1032 form that appellant previously completed put him on notice that he could not receive OPM and FECA benefits at the same time. The form stated, "I understand that I must immediately report to OWCP any improvement in my medical condition, any employment, any change in the status of claimed dependents, any third party settlement, and any change in income from federally assisted disability or benefit programs."

⁶ It does not appear that appellant submitted any evidence within the allotted period.

In a March 2, 2015 decision, OWCP determined that appellant received an \$11,864.54 overpayment of compensation. It also found that he was at fault in the creation of the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.⁷ Section 8129(a) of FECA provides, in pertinent part:

“When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”⁸

Section 8116(a) of FECA provides that while an employee is receiving compensation or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified instances.⁹ In *D.R.*,¹⁰ the Board determined that OWCP’s finding of an overpayment of compensation for a given period had not been established because it had not shown that the claimant actually received both OPM and FECA benefits for that period.

ANALYSIS -- ISSUE 1

OWCP based its overpayment finding on its determination that appellant received impermissible dual OPM and FECA benefits for the period September 26, 2014 to January 10, 2015. While the record reflects that appellant received FECA benefits for this period, OWCP did not show that he received OPM benefits for this period. There is no document in the record establishing as a matter of fact when appellant received OPM benefits, the periods for which he received such benefits, or the amounts of benefits he received.¹¹ Therefore, the evidence of record does not contain documentation showing that appellant received OPM benefits between September 26, 2014 and January 10, 2015. As it was alleged that appellant received dual benefits during this period, OWCP has not met its burden to establish the fact of an \$11,864.54 overpayment for this period.¹² The case shall be remanded to

⁷ *Id.* at § 8102(a).

⁸ *Id.* at § 8129(a).

⁹ *Id.* at § 8116(a).

¹⁰ Docket No. 13-1531 (issued October 21, 2013).

¹¹ The election form completed by appellant on September 26, 2014 would not show that he actually began to receive OPM benefits on any particular date.

¹² See *D.R.*, *supra* note 10.

OWCP for further development of this matter to be followed by the issuance of an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture regarding whether appellant received an \$11,864.54 overpayment of compensation.¹³

ORDER

IT IS HEREBY ORDERED THAT the March 2, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: July 28, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹³ Given that the case is not in posture regarding whether OWCP properly determined that appellant received an \$11,864.54 overpayment of compensation, it is premature for the Board to consider whether OWCP properly determined that he was at fault in the creation of any overpayment.